

**OPINION  
60-64**

April 22, 1960(OPINION)

COUNTIES

RE: Number and Election of Officers - County Judge - Consolidation of Offices

This is in reply to your request for an opinion wherein you state that the official census is being taken this year by the United States government and that you have reason to believe that the result of the census might disclose that your county will have a population of less than six thousand people.

You then ask for an interpretation of 11-1002 N.D.R.C. of 1943 as to what effect it will have if you run for the office of county judge and are elected in 1960, and then it turns out that the population of the county is below six thousand. You then ask in that event would the office to which you were elected be turned over to the elected register of deeds after the official announcement of the census.

You also ask what action must be taken by the Legislature to change the law so that the three offices (register of deeds, clerk of district court, and county judge) are no longer to be consolidated in a county where the population is six thousand or less.

You further ask what action must be taken to provide for a four year term for the county judges and other county officials.

Section 11-1002 N.D.R.C. of 1943 as is material here provides as follows:

"NUMBER AND ELECTION OF OFFICERS. Each organized county, unless it has adopted one of the optional forms of county government provided by this Code, shall have the following officers:

- 2. . . . .  
One register of deeds;
- 3. One clerk of the district court;
- 6. . . . .  
One county judge;

. . . . .  
In counties having a population of more than six thousand and not more than fifteen thousand, the county judge shall be an ex officio clerk of the district court, and in counties having a population of six thousand or less, the register of deeds shall be ex-officio clerk of the district court and county judge. . . ."

The above section is based on section 173 of the North Dakota Constitution and must be construed in light of the provisions of said constitutional section. Section 173 as amended by chapter 398 of the 1957 Session Laws provides as follows:

"At the first general election after the adoption of this amendment, and every two years thereafter, there shall be elected in each county, organized under the provision of section 172 of the Constitution of the State of North Dakota, a register of deeds, county auditor, treasurer, sheriff, state's attorney, county judge and a clerk of the district court, who shall be electors in the county in which they are elected and who shall hold office until their successors are elected and qualified; provided in counties having fifteen thousand population or less, the county judge shall also be clerk of the district court; provided further that in counties having a population of six thousand or less the register of deeds shall also be clerk of the district court and county judge. The legislative assembly shall enact appropriate legislation to make this amendment effective at their first session after its adoption."

The key language as is material to our question is "at the first general election after the adoption of this amendment, and every two years thereafter, there shall be elected, etc." The emphasis is placed on the provision "every two years thereafter, there shall be elected." This in effect means that the county is classified every two years, and the population at that time determines what officers are to be elected.

The provisions of section 173 of the Constitution cited above are self-executing (64 N.D. 620). This, however, means that the provisions of this section are operative without any further legislation. This does not mean that the offices referred to fluctuate in direct relation to the increase or decrease of the population of the county.

The language "provided further that in counties having a population of six thousand or less the register of deeds shall also be clerk of the district court and county judge" must be construed together with the opening sentence in section 173. The result would be as follows: "Every two years there shall be elected in each county with a population of six thousand or less a register of deeds, who shall also be the clerk of the district court and the county judge." It necessarily follows that the population which determines whether the offices are combined or separate is as existing at the time of the election. In other words, the population which determines the officers to be elected to certain offices is as it exists at the time of the election. The population of a county is a question of fact and as such can be established like any other fact is established.

This office in a previous opinion held that the latest official census is to be used unless the population is determined by some other competent, reliable source. It therefore follows that the last official census controls unless the population has been determined and established through some other competent source. In the absence of any other showing we consider the population to be as disclosed by the latest official census taken by the

United States government. This is particularly true considering section 1-0147 which provides as follows:

"The term 'population' shall mean the number of inhabitants as determined by the last preceding state or federal census."

In this respect the last census was determined in 1950. The population as determined by that census controls until the returns of the current census is released, published, and made available.

In *Watkins v. Venable*, 39 S.E. 147, the court in a somewhat similar instance said:

". . . . Whether there shall be one or two clerks elected in a county at a general election is determined by the last general census preceding the election, and, when elected, they hold their offices until the end of the term (six years), without regard to any changes that may take place in the population of the county during their term of office. . . ."

In this case the Constitution provided that in counties of less than fifteen thousand the clerk of the county court shall also be ex officio clerk of circuit court of the county and in counties having population of fifteen thousand or more there shall be a separate clerk of the circuit court of the county. The election was held in May, 1899, at a time when the county had a population of less than fifteen thousand. At that time a person was elected clerk of the county court who was also ex officio clerk of the circuit court. In 1900 the census report showed that the county had more than fifteen thousand inhabitants, whereupon the judge of the circuit court attempted to appoint a clerk of court for the circuit court. The court held that the population as determined by the prior census and as it existed at the time of the election determined whether a separate clerk of court would be elected or whether the clerk of the county court would also serve ex officio as clerk of the circuit court. The population at that time was less than fifteen thousand and as such the clerk served in both capacities.

In the case just mentioned the question arose as the result of the increase in population. Nevertheless, the principle of law applies equally well where there is a decrease in population.

Similar results were reached in *State ex rel Graybill v. Whitmore*, 9 N.W. 93, and *State ex rel Newman v. Stauffer*, 8 N.W. 432. It is observed that the constitutional provision does not specifically set the term of the officers to be elected. However, it does provide that there shall be elected every two years certain officers. This in effect sets the term for two years. Section 11-1005 sets the time when the terms of the county officers commence.

If we were to place a construction on section 173 of the Constitution to the effect that the population in itself without reference to a specific time controls the existence or nonexistence of certain offices or the combining of certain offices, it could lead to a frustrating situation. Take the example of a county that has the population of six thousand

and one in the month of January. As such, under our Constitution, the offices of register of deeds, clerk of court, and county judge would not be combined. But, if a person either leaves the county or dies in the month of February reducing the population to six thousand, the offices of county judge and clerk of court would be combined with the register of deeds. Then, assuming that a month or two later one or more people come into the county, either by birth or otherwise, increasing the population over six thousand again, the offices would be separated. This fluctuating condition could continue indefinitely. The situation would be almost intolerable if such rule of law were to prevail.

It seems that it is only practical and sensible to hold that where a certain office or offices are dependent upon the population, that the population be determined at a specific time which shall prevail for a certain designated period.

On the basis of the foregoing, it is our opinion that the population of a certain county as known and established at the time of the election controls in determining whether or not certain offices are to be combined and that the population at the time of the election controls during the entire term of the office to which the person was elected. In other words, the person elected to a certain office holds such office until the end of the term without regard to any change that may take place in the population of the county during the term of his office.

Thus, in direct response to your question the federal census taken in the year 1950 and the figures released for such census will control unless the federal census, which is being taken now, is officially determined and released prior to the general election of 1960, and further that if you are elected to the office of county judge where the last census showed a population of six thousand and one or more, you would be considered elected for a term of two years and would be entitled to serve those two years even though the official census released and published after the election shows that the population is six thousand or less.

The results of the current census must be made known at least early enough so that the ballots can be prepared or notice given as to the offices to be filled at such election as provided for under section 16-0602 of the 1957 Supplement to the N.D.R.C. of 1943 before any change in the present status would be effected.

In response to your other questions, we wish to advise that it would require a constitutional amendment to change the requirement of consolidating the three offices mentioned herein if the population is six thousand or less. It would also require a constitutional amendment to change the term of the county judge and other county officials from a two year term to a four year term.

LESLIE R. BURGUM  
Attorney General